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SEC DIVISION OF CORPORATION FINANCE STATEMENT ON CERTAIN PROTOCOL STAKING ACTIVITIES

On May 29, 2025, the staff ("Staff") of the Division of Corporation Finance of the U.S. Securities and Exchange Commission ("SEC") continued its recent pattern of issuing Staff guidance addressing cryptocurrency. The May 29 Staff statement, titled "Statement on Certain Protocol Staking Activities" (the "Statement"), provides the Staff's views on the staking of crypto assets ("Covered Crypto Assets") that are intrinsically linked to the programmatic functioning of public, permissionless networks that use proof-of-stake ("PoS") as a consensus mechanism ("PoS Networks"). Covered Crypto Assets are those that are (1) used to participate in and/or earned for participating in a PoS network's consensus mechanism or (2) used to maintain and/or earned for maintaining the technological operation and security of the PoS network (these activities are collectively referred to as "Protocol Staking").

Like with other recent Staff guidance covering cryptocurrency, the Staff noted that a Covered Crypto Asset in the context of Protocol Staking is not specifically enumerated in either the Securities Act of 1933, as amended (the "Securities Act") or the Securities Exchange Act of 1934, as amended (the "Exchange Act") as a type of "security;" and therefore, Protocol Staking Activities (detailed below) must be analyzed under the "investment contract" test delineated by *SEC v. W.J. Howey Co.*[1] In other words, as required by this test, the Staff analyzed the economic realities of Protocol Staking Activities by considering whether there is an investment of money in a common enterprise based on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. The Staff also considered other federal cases that specify that the "efforts of others" prong of the *Howey* test requires that such efforts be significant, "essential managerial efforts which affect the failure or success of the enterprise," rather than solely administrative and ministerial in nature.[2]

The Staff's view is that certain "Protocol Staking Activities" do not involve the offer and sale of securities within the meaning of Section 2(a)(1) of the Securities Act, or Section 3(a)(10) of the Exchange Act. Therefore, those participating in these Protocol Staking Activities do not need to register transactions under the Securities Act or fall within an exemption from registration.

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[1] 328 U.S. 293 (1946).

[2] See, e.g., *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973). See also, e.g., *First Fin. Fed. Sav. & Loan v. E.F. Hutton Mortgage*, 834 F.2d 685 (8th Cir. 1987)

It is of critical importance to note that the Staff's view is not dispositive as to whether any specific Protocol Staking Activity involves the offer and sale of a security. A definitive determination would require analyzing the facts relating to the specific Protocol Staking Activity.

PROTOCOL STAKING ACTIVITIES

PoS Networks permit users to participate in the operations of the network itself. Each network is run by a software protocol that enforces network rules and requirements. Each protocol incorporates a "consensus mechanism" that enables the network of unrelated computers, or "nodes," that maintain the network to agree on the "state" of the network, or the record that addresses ownership balances, transactions, smart contract code, and other data. According to the Statement, "PoS is a consensus mechanism used to prove that operators of nodes ('Node Operators') participating in the network have contributed value to the network." The Node Operators "stake the network's Covered Crypto Asset to be selected by the underlying software protocol to validate new blocks of data to, and update the state of, the network." Importantly, during staking, the Node Operator does not take possession of the Covered Crypto Asset.

In consideration for these services, a Node Operator can earn rewards, such as newly created Covered Crypto Assets or a percentage of transaction fees, paid in Covered Crypto Assets, by parties who are plan to add the transactions to the network. These rewards encourage Node Operators to use their Covered Crypto Assets to secure the PoS Network. Larger amounts of staked Covered Crypto Assets increase the security of PoS Networks, which mitigates the risk that another party could gain control of a majority of the total staked Covered Crypto Assets and manipulate the network.

The Statement applies only to the following Protocol Staking Activities:

- staking Covered Crypto Assets on a PoS Network;
- activities by third-party service providers, such as Node Operators (each a "Service Provider"), in the Protocol Staking process, including in connection with the earning and distribution of rewards; and
- providing administrative "Ancillary Services," including:
    - Slashing Coverage: a Service Provider reimburses or indemnifies a staking customer against loss resulting from slashing, essentially protecting against loss due to a Node Operator's errors;
    - Early Unbonding: a Service Provider allows Covered Crypto Assets to be returned to an owner before the end of the protocol's unbonding period as a convenience to the owner;[3]

[3] According to the Statement, staked Covered Crypto Assets are subject to a "bonding period," following which the Covered Crypto Asset owner becomes eligible to earn rewards. "The "unbonding period" is a length of time set by the protocol to "unstake" a Covered Crypto Asset. Each protocol has its own bonding and unbonding periods, which can be hours, days, or weeks."

- Alternate Rewards Payment Schedules and Amounts: a Service Provider delivers rewards on a schedule or in an amount that differs from the protocol's set schedule, provided the reward amounts are not fixed, guaranteed, or greater than those awarded by the protocol, as a convenience to the owner; and
- Aggregation of Covered Crypto Assets: a Service Provider offers Covered Crypto Asset owners the ability to aggregate their Covered Crypto Assets to meet the protocol's staking minimums.

ANALYSIS UNDER THE *HOWEY* TEST

Based on the *Howey* analysis set forth in the Statement, the Staff concluded that the following Protocol Staking Activities do not give rise to an investment contract:

- Self (or Solo) Staking: a Node Operator stakes Covered Crypto Assets it owns and controls using its own resources. In the Staff's view, Self-Staking is not undertaken with a reasonable expectation of profits from the entrepreneurial or managerial efforts of others; instead, any expectation of profits is derived solely from the administrative act of Protocol Staking. Rewards are payments to the Node Operator in exchange for the services it provides to the network, rather than profits derived from the efforts of others.
- Self-Custodial Staking Directly with a Third Party: a Node Operator, under the terms of the protocol, is granted the validation rights of owner(s) of Covered Crypto Assets. The Staff's position is that the Node Operator's service to the Covered Crypto Asset owner is administrative, and any expectation of profits is derived from the administrative act of Protocol Staking itself. Further, the Node Operator does not guarantee any amount of rewards to the Covered Crypto Asset owners, although the Node Operator may subtract its fees from any such rewards.
- Custodial Arrangements: a custodian holds and stakes Covered Crypto Assets on behalf of their owners. The Staff noted that the custodian does not decide whether, when, or how much of an owner's Covered Crypto Assets to stake, but simply conducts administrative or ministerial acts as an agent of the owner. Even where the custodian selects a Node Operator, *Howey's* "efforts of others" requirement is not satisfied because doing so does not involve managerial or entrepreneurial efforts. Further, like the Node Operator, above, the custodian does not guarantee any amount of the rewards to the Covered Crypto Asset owners, although it may subtract its fees from any such rewards.

COMMISSIONER RESPONSES

Commissioners Hester M. Peirce and Caroline A. Crenshaw both issued statements in response to the Statement, reflecting their divergent views on the Staff's guidance. Commissioner Peirce voiced her support for the Statement, stating that it "provides welcome clarity for stakers and 'staking-as-a-service' providers in the United States." In her view, "proof-of-stake network protocols are designed to encourage users to voluntarily coordinate and cooperate to secure the network," but Americans are cautious about participating due to fear of regulatory consequences.[4] In other words, the Statement should, in her view, provide some welcome certainty to those hoping to participate in the covered activities.

Commissioner Crenshaw, however, shared a dramatically different perspective. She began by pointing out the recent SEC enforcement actions, in which the SEC alleged, and two courts upheld, that "staking-as-a-service" programs were investment contracts under *Howey*. Historically, "investment contracts have been found to exist in a variety of circumstances where a promoter takes an established product or technology—which itself may not be a security or involve entrepreneurial effort—and 'buil[ds] an enterprise on top of it.'" In her view, consistent with this idea, courts in the recent SEC enforcement actions ruled that staking services were properly alleged to be investment contracts because they involved entrepreneurial efforts and enhanced profit potential beyond what customers could get from staking on their own. However, she draws attention to the fact that *Howey* requires a specific facts and circumstances analysis, such that the appropriate analysis in one case may not apply to another, and outcomes may differ. In her perspective, providing more specific information and guideposts would have been more helpful in enabling the real-world application of the Staff's guidance.

In her response, Commissioner Crenshaw also criticizes the Staff's recent approach to guidance on cryptocurrency overall, describing a "flurry of staff statements, enforcement action dismissals, and roundtables" which "continues to sow uncertainty around what the law is and what parts of it the Commission is willing to enforce, which is bad for investors and the markets." In a somewhat fiery conclusion, she voiced that the recent Staff "statements paint an incomplete picture that obfuscates, rather than clarifies, what the law is. Along the way, these guidances minimize and often misstate the significant risks these products pose to investors and markets. The SEC is the financial regulator charged with overseeing the preeminent U.S. securities markets, a responsibility whose import cannot be overstated. When we choose to speak, at any level of our organization, it should go without saying that we must do so accurately, in a way that serves our vital mission and the public interest."

Read the Staff Statement here, Commissioner Peirce's statement here, and Commissioner Crenshaw's statement here.

[4] *See SEC v. Binance Holdings Limited, et al.,* 738 F. Supp. 3d 20 (D.D.C. June 28, 2024); *SEC v. Coinbase, Inc.*, 726 F. Supp. 3d 260 (S.D.N.Y. Mar. 27, 2024); *see also SEC v. Payward Ventures, Inc., et al.,* Case No. 23-cv-588 (N.D. Cal., filed Feb. 9, 2023) (Kraken paid a $30 million penalty to settle charges that its staking-as-a-service program was offered as an unregistered security). Commissioner Crenshaw pointed out that the SEC's case against *Coinbase* and *Binance* were voluntarily dismissed.

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